NO. 17-71636

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Petitioners,

STATE OF NEW YORK, *et al.*,

Petitioner-Intervenors,

v.

ANDREW WHEELER, ACTING ADMINISTRATOR OF UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR REVIEW OF ORDER BY ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

PATTI A. GOLDMAN
MARISA C. ORDONIA
KRISTEN L. BOYLES
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340 | Phone
(206) 343-1526 | Fax
pgoldman@earthjustice.org
mordonia@earthjustice.org
kboyles@earthjustice.org
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This case concerns a federal agency's highly unusual violation of an express statutory duty to protect people and the environment. After years of delay, an order to act from this Court, undisputed agency findings that chlorpyrifos is unsafe, and a proposed rule to revoke all tolerances for the pesticide, Scott Pruitt, former Administrator of the Environmental Protection Agency ("EPA"), illegally denied the 2007 petition to ban chlorpyrifos and allowed its continued use on food, without finding the pesticide safe.

After petitioners League of United Latin American Citizens *et al.* ("LULAC") and several states filed objections to Administrator Pruitt's Order in June 2017, EPA never advanced their resolution. Instead, it used the administrative objection process to perpetuate its delay and illegal retention of chlorpyrifos tolerances. In this Court, EPA did not defend its action. It sought to avoid judicial review altogether. As the Panel explained, "EPA argues that, despite petitioners having properly-filed administrative objections to the 2017 Order more than a year ago, and despite the statutory requirement that the EPA respond to such objections 'as soon as practicable,' the EPA's utter failure to respond to the objections deprives us of jurisdiction to adjudicate whether the EPA exceeded its statutory authority in refusing to ban use of chlorpyrifos on food products." 899 F.3d 814, 817 (9th Cir. 2018).

The Panel refused to sanction this maneuver, heeding the Supreme Court's direction to avoid inappropriately treating exhaustion requirements as jurisdictional. In seeking rehearing, EPA contends that the Panel decision conflicts with a 1988 case that it never cited and with dicta from other cases that never addressed whether exhaustion was jurisdictional. EPA also seeks rehearing to modify the remedy in ways that would leave people—and children, in particular—in harm's way. While LULAC agrees that the remedy should be modified to exclude nonfood uses and cohere with statutory timelines for cancelling pesticide registrations, the remainder of the rehearing petition lacks merit and should be denied.

BACKGROUND

This case arises under a statute with unequivocal mandates and prohibitions. The Federal Food, Drug, and Cosmetic Act ("FFDCA") allows EPA to maintain a tolerance for a pesticide on food "only if the Administrator determines that the tolerance is safe," and it directs EPA to modify or revoke a tolerance if EPA has found the pesticide to be unsafe. 21 U.S.C. §346a(b)(2)(A)(i). In 2014, based on acute poisoning risks, EPA found chlorpyrifos unsafe due to drinking water contamination. ER 184;193-94; 267-79. In 2016, when EPA sought to protect children from reduced IQ, autism, attention deficit disorders, and other learning disabilities caused by low-level chlorpyrifos exposures, it strengthened its finding

that chlorpyrifos is unsafe, this time in every way people are exposed, whether in food, drinking water, or the air they breathe. ER 1249;1254-55;1271;1279-82;1290-93. EPA proposed to revoke all chlorpyrifos food tolerances in 2015. ER 1132-63. In mandamus litigation where this Court found EPA guilty of egregious and unreasonable delays, EPA faced a March 2017 deadline to make a final revocation determination and decision on the decade-old petition to ban chlorpyrifos to protect children. Because EPA could not find chlorpyrifos safe, it had only one course of action available to it under the law – revoke all tolerances.

Administrator Pruitt refused to finalize the tolerance revocation, not because he found chlorpyrifos safe, but because he wanted to delay taking regulatory action. ER 25, 34. This petition for review challenged that decision as *ultra vires* because EPA did precisely what the FFDCA forbids by leaving tolerances in place for a pesticide it could not find safe. Rather than defend on the merits, EPA argued that this Court lacked jurisdiction without a ruling on the objections, even though the FFDCA requires EPA to decide objections "[a]s soon as practicable." 21 U.S.C. §346a(g)(2)(C).

The Panel held that EPA exceeded its statutory authority by refusing to ban the use of chlorpyrifos on food products in the face of its findings that chlorpyrifos harms "the physical and mental development of American infants and children, often lasting into adulthood." 899 F.3d at 817. Addressing EPA's sole defense,

the Panel reviewed the Supreme Court's cautionary warnings against deeming procedural rules to be jurisdictional. Under recent precedent, to be jurisdictional, a statutory requirement must do more than direct a party to take certain procedural steps and must clearly state that it restricts adjudicatory power. *Id.* at 821.

The Panel found the FFDCA exhaustion requirement similar to non-jurisdictional provisions requiring exhaustion before a party could obtain judicial review, and that the FFDCA contains no clear statement that exhaustion is jurisdictional. Instead, the requirement to file objections appears in a separate statutory subsection as a requirement imposed on parties, not a limitation on the power of the Court. *Id.* at 822-23. At its core, the FFDCA vests jurisdiction in the court of appeals, and the direction to respond to objections "[a]s soon as practicable," belies congressional intent to preclude judicial review where EPA proves unwilling to rule on the objections. *Id.* at 824.

The Panel rejected EPA's primary reliance on the structural similarities between the objection process and a process that this Court suggested was jurisdictional in dicta in *Gallo Cattle Co. v. Dep't of Agric.*, 159 F.3d 1194 (9th Cir. 1998), because subsequent precedent superseded that dicta:

> *Gallo* was premised on a view of statutory exhaustion that is inconsistent with subsequent Supreme Court precedent and later decisions in this circuit. . . . We have specifically cautioned against reliance on prior cases like *Gallo* "decided without the benefit of the Supreme Court's recent admonitions against profligate use of the term jurisdictional."

899 F.3d at 825-26 (quoting *Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1039 (9th Cir. 2012).[1] The Panel also dismissed dicta in *In re Pesticide Action Network* ("*PANNA*"), 863 F.3d 1131, 1133 (9th Cir. 2017), that did not speak to the jurisdictional issue. 899 F.3d at 826.

The Panel then waived exhaustion based on well-settled law and the unique circumstances of this case. First, this case presents purely legal questions that do not depend on agency expertise, and EPA offered no defense on the merits, "effectively conceding its lawlessness." *Id.* at 826-27. Second, by failing to respond to the objections, EPA "is engaging in yet more delay tactics to avoid our reaching the merits of the sole statutory issue raised here: whether chlorpyrifos must be banned from use on food products because the EPA has not determined that there is a 'reasonable certainty' that no harm will result from its use, even under the established tolerances." *Id.* at 827. Third, foreclosing judicial review for an unconscionably long period of time is "particularly prejudicial here where the continued use of chlorpyrifos is associated with severe and irreversible health effects." *Id.* at 828. Accordingly, the Panel vacated the Order and remanded the case to EPA with directions to revoke all tolerances and cancel all registrations for chlorpyrifos within 60 days. *Id.* at 829.

[1] The D.C. Circuit applied more recent precedent and reached the opposite result of *Gallo*. *Avocado Plus, Inc. v. Veneman*, 370 F.3d 1243 (D.C. Cir. 2004).

Judge Fernandez dissented from the jurisdictional ruling. *Id.* at 830-33. As to the merits, he found that the Panel discussion "does have some persuasive value." *Id.* at 834. EPA's petition for rehearing or rehearing en banc followed.

ARGUMENT

I. THERE IS NO BASIS FOR REHEARING THE JURISDICTIONAL ISSUE.

En banc review is disfavored. *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987). It is appropriate "only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). It is warranted in the face of "an irreconcilable conflict between the holdings of controlling prior decisions of this court." *Atonio*, 810 F.2d at 1478; Fed. R. App. P. 35 (consideration "necessary to secure and maintain uniformity of the court's decisions").

There is no conflict here. EPA tries to manufacture one by relying on dicta in two cases, including an out-of-Circuit case, but neither applied the Supreme Court's current case law on jurisdiction. EPA also relies on a 30-year-old case that construed the FFDCA before its 1996 overhaul and before the advent of modern legal standards. The Panel applied intervening Supreme Court and Circuit

precedent and is fully in accord, rather than in conflict, with that precedent. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003).

A. A Departure From Dicta Does Not Warrant Rehearing En Banc.

EPA points to a Second Circuit case that held that district court review of a tolerance determination is unavailable if the issues can be heard in the court of appeals under the FFDCA. *Nat. Res. Def. Council v. Johnson*, 461 F.3d 164, 176 (2nd Cir. 2006). That case, like *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S.Ct. 617 (2018), cited by EPA, addressed whether district or Circuit courts have jurisdiction to decide particular issues, not whether exhaustion requirements are jurisdictional. Such "pure dictum" from another Circuit that addressed a different issue is too thin a reed to support en banc review. 899 F.3d at 824.[2]

EPA also invokes dicta from *PANNA*, which similarly never addressed jurisdiction. In *PANNA*, this Court issued a writ of mandamus and set deadlines for EPA to act upon finding EPA's delay in deciding the 2007 petition to ban chlorpyrifos "egregious" and "unreasonable." 798 F.3d 809, 811, 814 (9th Cir. 2015). The Court denied a motion for further mandamus relief because EPA had taken final action by denying the petition. It recited the FFDCA requirement to file

[2] *Johnson* challenged EPA's findings that pesticides were safe and sought a remand for new scientific findings. This case differs materially from *Johnson* because EPA has found chlorpyrifos unsafe, and it has no power to retain tolerances for an unsafe pesticide.

objections without addressing whether objections are a jurisdictional prerequisite. *PANNA* explained: "[t]hese mandamus proceedings have addressed the *timing*, not the *substance*, of EPA's response." 863 F.3d at 1132 (emphasis in original). In contrast, this case challenges the substance of that response; petitioners filed objections; and EPA failed to issue a timely response. *PANNA* never addressed whether EPA could defeat jurisdiction and prolong its violation of the law by sitting on the administrative objections.

B. A 30-Year-Old Case That Addressed a Since Overhauled FFDCA And Predated Controlling Precedent Does Not Support En Banc Review.

EPA argues that the Panel's jurisdictional ruling conflicts with a 30-year-old case that it never cited below. *Nader v. EPA*, 859 F.2d 747 (9th Cir. 1988), rejected a challenge to a denial of a petition to revoke tolerances because Nader had not filed objections. Both the FFDCA and the controlling legal standards have since changed so dramatically that *Nader* does not support en banc review.

First, EPA cites *Nader*'s construction of 21 U.S.C. §348, while this case invokes 21 U.S.C. §346a, which codifies Congress's 1996 overhaul of the FFDCA's provisions to protect children. The completely revamped §346a codifies a far stronger safety standard and the prohibition on retaining tolerances EPA cannot find safe. It also establishes a right to petition to revoke tolerances with a limited set of outcomes and to obtain judicial review of EPA's action on such a

petition.[3] *Nader*'s discussion of the superseded §346a, which EPA does not cite, highlighted its "permissive terms," which gave EPA "considerable latitude" in deciding whether to establish tolerances and indicated the Court might reach the opposite result if the statute prescribed a specific outcome. 859 F.2d at 752. The overhauled §346a prescribes outcomes; it gives EPA no discretion to allow children to be exposed to unsafe pesticides. Treating the objection process as jurisdictional would defeat Congress's mandates.

Second, *Nader* analyzed whether dispensing with exhaustion would encourage flouting of the administrative process, engaging in a fact-based analysis of whether exhaustion should be waived. The Court emphasized, for example, that Nader did not challenge EPA's final rule lowering tolerances, which could be appealed without filing objections, and that waiving exhaustion would deny EPA the opportunity to apply its expertise to the scientific issues the Court was being

[3] When *Nader* was decided, §346a(d) & (e) authorized petitions or requests to establish tolerances. As revamped, petitions can seek revocation of tolerances. In response, the Administrator may take one of three alternative actions: (1) issue a final regulation modifying or revoking the tolerances; (2) issue a proposed regulation and thereafter a final tolerance regulation; **or** (3) issue an order denying the petition. *Id.* §346a(d)(4). In response to the 2007 Petition, EPA proposed a regulation revoking all chlorpyrifos tolerances. After the change in administration, EPA concurrently pursued two of the mutually exclusive courses of action. It issued an order denying the 2007 Petition without withdrawing the proposed revocation rule, which left the proposed revocation rule in limbo. Congress never envisioned, let alone countenanced, this outcome.

asked to resolve. These rationales apply waiver principles, rather than jurisdictional ones.

Third, the *Nader* Court simply applied a plain reading of the objection process to the facts. While the Court used the term "jurisdiction" in its 1988 ruling, it did not apply the controlling standards for determining whether exhaustion is jurisdictional. In fact, *Nader* long predated the development of the controlling precedent, which makes most exhaustion and other procedural prerequisites non-jurisdictional.

Recognizing that the term "jurisdictional" has been used to convey too many meanings, the Supreme Court has endeavored in recent years to articulate stricter distinctions between jurisdictional and claim-processing rules. *See Sebelius v. Auburn Regional Medical Ctr.*, 568 U.S. 145, 153-54 (2013); *Gonzalez* v. *Thaler*, 565 U.S. 134, 141-42 (2012); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-11 (2006). Congress must "clearly state" that a procedural requirement is "jurisdictional" before it is given such effect. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 163 (2010) (quoting *Arbaugh*, 546 U.S. at 515); *accord Henderson v. Shinseki*, 562 U.S. 428, 438 (2011).

Applying this test, the Supreme Court has held seemingly mandatory exhaustion requirements and other claim-processing rules non-jurisdictional. In *Reed Elsevier*, 559 U.S. at 163-66, the federal court had jurisdiction over a claim

based on an unregistered copyright even though 17 U.S.C. §411(a) provides that "no civil action for infringement of the copyright in any United States work shall be instituted until the preregistration or registration of the copyright has been made." *Accord Sebelius,* 568 U.S. at 153-56 (time limit for health care providers to appeal reimbursement decision non-jurisdictional); *Gonzalez,* 565 U.S. at 140-48 (requirement that certificate of appealability attest to constitutional issues in federal habeas case non-jurisdictional); *Henderson*, 562 U.S. at 438-40 (120-day deadline for filing veteran benefits appeals non-jurisdictional); *Union Pac. RR Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment Cent. Region*, 558 U.S. 67, 81-82 (2009) (settlement conference requirement for grievances non-jurisdictional); *Kontrick v. Ryan,* 540 U.S. 443, 452-56 (2004) (filing deadlines in bankruptcy rules non-jurisdictional).

This Court has likewise held various exhaustion requirements non-jurisdictional even where exhaustion is required in mandatory language. For example, *McBride Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 978-80 (9th Cir. 2002), held that exhaustion was non-jurisdictional even though the statute provided "[n]otwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary [of Agriculture] or required by law before the person may bring an action in a court." *See also Payne v. Peninsula School Dist.*, 653 F.3d 863, 867-68 (9th Cir. 2011) (en banc)

(exhaustion requirement before a civil action may be filed non-jurisdictional), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc); *Anderson v. Babbitt*, 230 F.3d 1158, 1162 (9th Cir. 2000) ("[n]o decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review.[4]

As the Supreme Court has clarified the distinction between subject-matter jurisdiction and claim-processing rules, it has criticized past decisions for being "profligate" and "less than meticulous" in using the term "jurisdiction." *Arbaugh*, 546 U.S. at 510-11. The Supreme Court has described such unrefined dispositions as "drive-by jurisdictional rulings" that should be accorded "no precedential effect" on whether the federal court had jurisdiction. *Id.* at 511; *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 91 (1998). Heeding this direction, this Court has cautioned against reliance on old cases "decided without the benefit of the Supreme Court's admonitions against profligate use of the term

---

[4] EPA (ECF 115-1 at 16) errs in attempting to confine this line of precedent to statutes of limitations. The cases have treated statutes of limitations and exhaustion requirements the same in announcing and applying the jurisdictional test. *See, e.g., Reed Elsevier,* 559 U.S. at 166 ("threshold requirements that claimants must complete, or exhaust, before filing a lawsuit" non-jurisdictional). *Payne* and *Anderson*, *supra* at 11-12, and *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561 (1989), concerned exhaustion.

jurisdictional." *Merritt*, 759 F.3d at 1039. *Nader* is such a case. Accordingly, it should be accorded no precedential effect and does not support en banc review.

C. EPA's Disagreement With The Panel's Statutory Construction Does Not Warrant Rehearing En Banc.

The fact that EPA would prefer a different outcome does not support en banc review. The Panel held the objection process non-jurisdictional because it is neither labeled jurisdictional nor located in a jurisdiction-granting provision. 899 F.3d at 823. EPA contests this holding because the judicial review provision uses the term "jurisdiction" in stating that the court shall have exclusive jurisdiction to affirm or set aside the challenged action (ECF 115-1-12), but a statement that jurisdiction is exclusive in the court of appeals does not make the objection process itself jurisdictional. *See Reed Elsevier*, 559 U.S. at 163 (mere use of the term "jurisdiction" does not render a requirement jurisdictional unless the statute's jurisdictional language and context make it so). EPA also cites a heading referring to the Administrator's ruling on the objections as a "[f]inal decision," but that term is absent from the FFDCA's judicial review provision and therefore adds nothing. And the Panel properly read the provision prohibiting judicial review under other laws of "[a]ny issue as to which review is or was obtainable" under the FFDCA, 21 U.S.C. §346a(h)(5), as limiting judicial review under other statutory provisions, and not a jurisdictional pronouncement as to internal FFDCA procedures. 899 F.3d at 823-24.

Finally, the Panel decision will have little import beyond this case. It applies controlling precedent to one statutory scheme and finds waiver under unique circumstances where EPA has violated an express statutory mandate and has unjustifiably delayed complying with the law. EPA's plea to let the objection process run its course is a ploy to allow an illegal result at the expense of the protections Congress mandated for children's health. Tellingly, EPA has taken no action on the objections over the past 16 months. While the outcome of this case matters a great deal to children who are being exposed to chlorpyrifos, these proceedings involve no questions of exceptional legal importance warranting en banc review and EPA does not contend otherwise.

II. REHEARING THE ORDER TO REVOKE TOLERANCES IS UNWARRANTED.

Upon holding that EPA violated the FFDCA by retaining chlorpyrifos tolerances in the absence of a safety finding, the Panel vacated the Pruitt Order and remanded to EPA with directions to revoke all chlorpyrifos tolerances within 60 days. 899 F.3d at 829. EPA concedes that the Panel can direct EPA to conform its remand action to the holding that EPA cannot retain chlorpyrifos tolerances without a safety finding, ECF 115-1-19, and it indicates that it will revoke the tolerances if rehearing is denied. ECF 115-1-18n.5.[5]

[5] EPA hypothesizes that it might be able to retain tolerances if it made a safety finding, but it has not and cannot do so given its extensive assessments finding

EPA nonetheless asserts that the order to revoke tolerances conflicts with Supreme Court precedent. It cites several cases where the agencies had some discretionary function to perform on remand. In contrast, here, nothing EPA could do on remand can arrogate to itself the power to do what Congress has denied—retain tolerances without a safety finding.

The cases cited by EPA were remanded for the agencies to conduct further proceedings that would shape the agency action. In *Florida Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952), the agency had the discretion to issue a license for power lines and had multiple ways to correct an illegal license condition. In *California Wilderness Coal. v. Dep't of Energy*, 631 F.3d 1072 (9th Cir. 2011), this Court vacated a study and remanded to the agency to implement consultation procedures it had previously sidestepped. In *Camp v. Pitts*, 411 U.S. 138 (1973), and *Florida Power & Light Co. v. Lorion,* 470 U.S. 729 (1985), the Court remanded for further fact-finding where the record lacked an adequate explanation. And in *NW Coal. for Alternatives to Pesticides v. EPA,* 544 F.3d 1043 (9th Cir. 2008), this Court remanded to EPA to correct methodological flaws

---

chlorpyrifos is unsafe, including, *e.g.*, that infants are exposed to 140 times more than safe levels of chlorpyrifos in food. ER 1254; 1271.

in its scientific analysis. In none of these cases was the outcome foreordained by the judicial ruling.

Here, EPA has no discretion on remand to leave the tolerances in place. EPA's complaints about the Panel's remand order elevate form over substance given that revoking all chlorpyrifos tolerances is its only legal option and is what it plans to do.

EPA's request would only result in further delay. Tellingly, EPA asserts that any order or tolerance revocation issued on remand would be subject to a new round of objections and requests for a hearing from the registrants and others. ECF 115-1-18. EPA might grant a stay of the tolerance revocation until it ruled on the objections, which as this case has demonstrated would likely be years—or never. The Panel's order put a stop to EPA's refusal to follow the law. This Court should deny EPA's request for an open-ended remand in the face of its violation of the congressional mandates to protect children from this extremely dangerous pesticide, which would have been out of our food by October 2017, if EPA had finalized the tolerance revocation rule, instead of denying the 2007 Petition.

III. PETITIONERS SUPPORT MODIFYING THE ORDER TO ALLOW ADDITIONAL TIME TO CANCEL REGISTRATIONS AND TO CLARIFY THAT IT APPLIES ONLY TO FOOD USES.

EPA asks the panel to allow additional time for EPA to cancel registrations to coincide with the timelines in the Federal Insecticide, Fungicide, and

Rodenticide Act ("FIFRA"). Petitioners support modifying the order to direct EPA to revoke all chlorpyrifos tolerances within 60 days and to cancel the associated registrations as soon thereafter as possible.

In 1996, Congress expressly linked food tolerances and registrations of pesticides for use on food. If a pesticide poses a human dietary risk inconsistent with the FFDCA safety standard, it poses unreasonable adverse effects and cannot be registered for use on food or feed. 7 U.S.C. §136(bb). Accordingly, if a tolerance has been revoked, EPA must cancel the associated registration. *See* 21 U.S.C. §346a(l)(1) (EPA shall coordinate tolerance revocations with related necessary actions under FIFRA).

A FIFRA cancellation entails certain procedures, including internal review and a 30-day public notice, that could take more than 60 days. Petitioners, therefore, agree that the order should be modified to give EPA additional time to cancel food and feed registrations after the associated tolerances are revoked.[6]

Finally, petitioners agree that the direction to cancel registrations should explicitly be limited to uses of chlorpyrifos that can result in residues on food. This case sought review of the Pruitt Order under the FFDCA or in the alternative

[6] EPA implies that cancellation could entail lengthy proceedings and litigation, but given the unequivocal statutory prohibition on maintaining registrations for uses on food or feed without associated tolerances, cancellation would be inevitable and no contested facts would be relevant.

under FIFRA to the extent it incorporates the same food safety standard. The Panel focused on the legal mandate to ban chlorpyrifos from use on food unless EPA has found the food safe. 899 F.3d at 817, 829. Because petitioners did not invoke this Court's jurisdiction to review EPA's action with respect to non-food uses of chlorpyrifos, they agree the order should be clarified to apply only to use of chlorpyrifos on food and feed.[7]

CONCLUSION

The petition for rehearing and rehearing en banc should be denied, except the order should be modified to direct EPA to revoke all chlorpyrifos tolerances within 60 days and to cancel the associated registrations as soon thereafter as possible.

[7] The 2007 Petition sought cancellation of chlorpyrifos registrations based on the risks to children from low-level exposures, and a 2016 petition sought cancellation of all chlorpyrifos registrations based on EPA's findings of risks of concern in its human health risk assessments, including from use in nurseries, on sod farms and golf courses, and for mosquito control. ER1; 1740-75. LULAC reserves the right to seek a writ of mandamus compelling EPA to take regulatory action regarding non-food uses.

October 16, 2018

Respectfully submitted,

/s/ Patti A. Goldman

PATTI A. GOLDMAN
MARISA C. ORDONIA
KRISTEN L. BOYLES
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340 | Phone
(206) 343-1526 | Fax
pgoldman@earthjustice.org
mordonia@earthjustice.org
kboyles@earthjustice.org
Attorneys for Petitioners

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 17-71636

Note: *This form must be signed by the attorney or unrepresented litigant and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 4,198 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant	/s/ Patti A. Goldman	Date	10/16/2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2018, I electronically filed the foregoing *RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Patti A. Goldman
Patti A. Goldman